



DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2022-0007]

Renewal Package from the State of California to the Surface Transportation Project Delivery Program and Proposed Memorandum of Understanding (MOU) Assigning Environmental Responsibilities to the State

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of proposed MOU and request for comments.

SUMMARY: This notice announces that FHWA has received and reviewed a renewal package from the California Department of Transportation (Caltrans) requesting renewed participation in the Surface Transportation Project Delivery Program (Program). This Program allows for FHWA to assign, and States to assume, responsibilities under the National Environmental Policy Act (NEPA), and all or part of FHWA's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to one or more Federal highway projects within the State. The FHWA determined the renewal package to be complete and developed a draft renewal MOU with Caltrans outlining how the State will implement the Program with FHWA oversight. The public is invited to comment on Caltrans' request, including its renewal package and the proposed renewal MOU, which includes the proposed assignments and assumptions of environmental review, consultation, and other activities.

DATES: Please submit comments by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to www.regulations.gov and follow the online instructions for submitting comments.
- Facsimile (Fax): 1-202-493-2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Ave., S.E., West Building Ground Floor Room W12-140, Washington, DC 20590-0001.
- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. S.E., Washington, DC 20590 between 9:00 a.m. and 5:00 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For FHWA: Shawn Oliver by e-mail at: Shawn.Oliver@dot.gov or by telephone at (916) 498-5048. The FHWA California Division Office's normal business hours are 8:00 a.m. to 4:30 p.m. (Pacific Time), Monday-Friday, except for Federal holidays. For the State of California: Chris Benz-Blumberg by e-mail at Chris.Benz-Blumberg@dot.ca.gov or by telephone at (916) 956-8660. State business hours are the same as above although State holidays may not completely coincide with Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the Federal Register's home page at www.archives.gov. An electronic version of the application materials and proposed MOU may be downloaded by accessing the DOT docket, as described above, at www.regulations.gov/.

Background

Section 327 of Title 23, United States Code (U.S.C.), allows the Secretary of the DOT to assign, and a State to assume, the responsibilities under the NEPA (42 U.S.C. 4321 et seq.) and all or part of the responsibilities for environmental review, consultation, or other actions required under certain Federal environmental laws with respect to one or more Federal-aid highway projects within the State. The FHWA is authorized to act on behalf of the Secretary with respect to these matters.

Caltrans entered the Program on July 1, 2007, after submitting its application to FHWA, obtaining FHWA's approval, and entering into a MOU in accordance with 23 U.S.C. 327 and FHWA's application regulations for the Program (the original 23 CFR part 773).

On April 11, 2007, FHWA published a notice of Caltrans' draft MOU in the Federal Register to solicit the view of the public and Federal agencies on FHWA's preliminary decision to approve the application. Following the comment period, FHWA and Caltrans considered comments and proceeded to execute the MOU. Effective July 1, 2007, Caltrans assumed FHWA's responsibilities under NEPA, and the responsibilities for reviews under other Federal environmental requirements. Subsequently, Caltrans has applied to renew its participation in the Program. Caltrans entered into renewal MOUs with FHWA on October 1, 2012, and December 23, 2016 (2016 MOU).

On June 1, 2021, after coordination with FHWA, Caltrans submitted a renewal package in accordance with the renewal regulations in 23 CFR 773.115. On October 21, 2021, Caltrans requested an extension to the 2016 MOU in order to allow further discussion between the parties on the new language for the renewal MOU. In a letter dated December 8, 2021, FHWA granted an extension of the MOU until April 29, 2022. Under the proposed renewal MOU, FHWA would assign to the State, through Caltrans, the responsibility for making decisions on the following types of highway projects:

1. All Class I, or environmental impact statement projects, both on the State highway system (SHS) and Local Assistance projects off the SHS that are funded by FHWA or require FHWA approvals.

2. All Class II, or categorically excluded (CE) projects, both on the SHS and Local Assistance projects off the SHS that are funded by FHWA or require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to the MOU for environmental reviews and decisions for actions qualifying for CEs pursuant to the 23 U.S.C. 326 program.

3. All Class III, or environmental assessment projects, both on the SHS and Local Assistance projects off the SHS that are funded by FHWA or require FHWA approvals.

4. Projects funded by other Federal agencies, or projects without any Federal funding, of any Class that also include funding by FHWA or require FHWA approvals and meet the definition of a highway project found at 23 CFR 773.103. For these projects, Caltrans would not assume the NEPA responsibilities of other Federal agencies. However, Caltrans may use or adopt other Federal agencies' NEPA analyses consistent with 40 CFR 1500-1508, and DOT and FHWA regulations, policies, and guidance.

Excluded from assignment are highway projects authorized under 23 U.S.C. 202 and 203; highway projects under 23 U.S.C. 204, unless the project will be designed and constructed by Caltrans; projects that cross State boundaries; projects that cross or are adjacent to international boundaries; and any projects that may be designed and constructed by FHWA under a 23 U.S.C. 308 agreement between the FHWA Central Federal Lands Highway Division and Caltrans.

The assignment also would give Caltrans the responsibility to conduct the following environmental review, consultation, and other related activities:

Air Quality

- Clean Air Act (CAA), 42 U.S.C. 7401–7671q, with the exception of any project level conformity determinations.

Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- FHWA noise regulations in 23 CFR part 772

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. 1531–1544
- Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
- Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. 703–712
- Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801-1891d

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101, et seq.
- Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm
- Archeological and Historic Preservation Act, 54 U.S.C. 312501-312508
- Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001–3013; 18 U.S.C. 1170

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 1996
- Farmland Protection Policy Act, 7 U.S.C. 4201–4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251–1387 (Sections 401, 402 404, and Section 319)
- Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
- Coastal Zone Management Act, 16 U.S.C. 1451-1466

- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f – 300j–26
- Rivers and Harbors Act of 1899, 33 U.S.C. 403
- Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001–4130

Parklands

- Section 4(f), 23 U.S.C. 138 and 49 U.S.C. 303
- Land and Water Conservation Fund Act, 54 U.S.C. 200302 - 200310

Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 – 9675
- Superfund Amendments and Reauthorization Act, 42 U.S.C. 9671 - 9675
- Resource Conservation and Recovery Act, 42 U.S.C. 6901 – 6992k

FHWA-Specific

- Planning and Environment Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. 169, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

Executive Orders (EO) Relating to Highway Projects

- EO 11990, Protection of Wetlands
- EO 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR sections 650.113 and 650.115)

- EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- EO 13112, Invasive Species
- EO 13985 - Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- EO 13990 - Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis
- EO 14008 - Tackling the Climate Crisis at Home and Abroad
- Other EOs not listed, but related to highway projects.

The proposed renewal MOU would allow Caltrans to continue to act in the place of FHWA in carrying out the environmental review-related functions described above, except with respect to government-to-government consultations with federally recognized Indian Tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian Tribes, which is required under some of the listed laws and EOs. Caltrans will continue to handle routine consultations with the Tribes and understands that a Tribe has the right to direct consultation with FHWA upon request. Caltrans also may assist FHWA with formal consultations, with consent of a Tribe, but FHWA remains responsible for the consultation. Caltrans also will not assume FHWA's responsibilities for conformity determinations required under Section 176 of the CAA (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.

The MOU content reflects Caltrans' desire to continue its participation in the Program. The FHWA and Caltrans have agreed to modify some of the provisions in the MOU to, among other things: clarify the categories of projects for which Caltrans is assigned responsibility, designate a Senior Agency Official at Caltrans consistent with 40 CFR 1508.1(dd); remove projects for which FHWA retained responsibilities for

environmental review following a NEPA decision; update record retention requirements; provide for enhanced reporting to FHWA on issues including environmental justice analysis and associated mitigation, where applicable; revise provisions related to data and information requests; and revise provisions related to FHWA-initiated withdrawal of assigned projects.

Prior MOUs in this Program had 5-year terms. Changes to 23 U.S.C. 327(c)(5) under the Bipartisan Infrastructure Law (Infrastructure Investment and Jobs Act, Pub. L. 117-58), enacted on November 15, 2021, require that MOUs have a term of 10 years for a State that has assumed the responsibility for environmental review under the Program for 10 years or longer. Caltrans has participated in this program for 15 years. Therefore, this proposed renewal MOU will have a term of 10 years.

A copy of the proposed renewal MOU and renewal package may be viewed on the DOT Docket, as described above, or may be obtained by contacting FHWA or the State at the addresses provided above. A copy also may be viewed on Caltrans' Web site at: <https://dot.ca.gov/programs/environmental-analysis/nepa-assignment>.

The FHWA California Division, in consultation with FHWA Headquarters, will consider the comments submitted when making its decision on the proposed MOU revision. Any final renewal MOU approved by FHWA may include changes based on comments and consultations relating to the proposed renewal MOU and will be made publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing EO 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 327; 42 U.S.C. 4331, 4332; 23 CFR 773; 40 CFR 1507.3, 1508.4.

Stephanie Pollack,
Deputy Administrator,
Federal Highway Administration.

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